1948 *Present :* **Basnayake J.**

PONNAMMAH, Appellant, *and* RAJAKULASINGHAM, Respondent

S. C. 488—M. C. Batticaloa, 4,731

Births and Deaths Registration Ordinance—Certificate signed by Additional Assistant Provincial Registrar—Not prima facie *evidence—Section 42—Customary marriage among Hindus—Tying of* thali *not always essential.*

A certificate of death under the hand of a person who describes himself as an Additional Assistant Provincial Registrar is not *prima facie* evidence under section 42 of the Births and Deaths Registration Ordinance because it is not certified by a prescribed officer.

A person who alleges that the *thali* ceremony is essential to a valid marriage in the community to which the parties belong should prove it as a question of fact.

Ratnamma v. Rasiah (1947) 48 N. L. R. 475, doubted.

APPEAL from a judgment of the Magistrate, Batticaloa.

P. Navaratnarajah, for the applicant, appellant.

M. D. H. Jayawardene, for the defendant, respondent.

Cur. adv. vult.

July 14, 1948. BASNAYAKE J.—

The appellant who claims to be the wife of the respondent who is a Village Headman, asks for an allowance for her maintenance under section 2 of the Maintenance Ordinance, on the ground that the respondent has neglected to maintain her. The appellant and the respondent are Hindu Tamils residing in the Eastern Province. It appears that they were married according to Hindu rites on January 29, 1940. The appellant's case is supported by the evidence of several witnesses, such as the Village Headman of her division at the time of her marriage, a retired Apothecary and his wife, and one of the dhobies who performed certain customary functions at the wedding. The Village Headman and the Apothecary appear to be responsible and leading men in the area. The former is related to the respondent, and the latter to the appellant. They all testify to the fact that a marriage between the appellant and the respondent was celebrated, that the customary rites including the *kalam* and *kurai* ceremonies were performed, and that among the wedding guests were the Headman and teachers. But the witnesses state, and the appellant admits, that the *thali* ceremony was not performed. The respondent neither gave nor called evidence. The case therefore rests on the uncontradicted evidence of the appellant and her witnesses.

At the end of the appellant's case the proctor for the respondent produced a death certificate which he informed the court was the death certificate of the respondent's first wife. He stated that that certificate shows that the respondent's first wife died on October 2, 1940. If that be so the respondent's marriage with the appellant on January 29, 1940, was during the life-time of his first wife. The object of producing this document appears to be to show that the marriage with the appellant is invalid by operation of section 17 of the Marriage Registration Ordinance which says : " No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void."

The appellant who is an aunt of the respondent's deceased wife was during her life-time closely associated with the family and was in fact looking after the respondent's children. Although there is no evidence that the first marriage was a legal marriage, the appellant has not challenged it. In fact her evidence goes to show that it was a proper customary marriage, for she says that the *thali* ceremony was performed at the respondent's first marriage although it was not performed at her own.

Even if the death certificate filed of record relates to the respondent's first wife, it is contradicted by the oral evidence of the appellant and two of her witnesses. According to them the first wife of the respondent died somewhere about September, 1939, whereas the certificate of death indicates that the person referred to therein died in October, 1940. The death certificate D1 has not been formally proved and produced as an exhibit, nor is there evidence that the death certificate relates to the respondent's first wife. The respondent could have produced it and given evidence that the particulars therein refer to his deceased wife, or he could have called a witness who knew the facts to speak to its identity. He has not done so.

Although under section 42 of the Births and Deaths Registration Ordinance, a copy or extract purporting to be under the hand of the Registrar-General or his Assistant or of the Provincial Registrar or the Assistant Provincial Registrar or purporting to be made under the hand of a Registrar and countersigned by the Registrar-General, Provincial Registrar or Assistant Provincial Registrar shall be received as *prima facie* evidence of the death to which it refers without any further or other proof of such entry, such copy does not become evidence in any legal proceedings unless it is tendered in evidence through a witness who deposes to the fact that it is the certificate of death of the person mentioned therein and that he or she is the identical person whose death is in question. Here we have no such evidence. The only evidence on record as to the date of death of the respondent's first wife is that of the appellant and her witnesses, which must be accepted in the absence of any evidence to the contrary. I observe that the document D1 does not even satisfy the requirements of section 42, for it does not purport to be under the hand of any one of the officers designated therein. It is signed by an officer who describes himself as Additional Assistant Provincial Registrar, which is not one of the offices mentioned in the section. The document cannot therefore be received as *prima facie* evidence of the death to which it refers because it is not certified by the prescribed officer. It is only documents which satisfy the requirements of section 42 that can be so received.

Even though the document has not been properly certified and proved to be the death certificate of the respondent's first wife, the learned Magistrate has not only acted on it but has accepted it as if it were conclusive proof of the date of death of the respondent's first wife. A certificate of death given under section 42 if properly proved and identified is only *prima facie* proof of the fact of death but not *prima facie* proof of the date of death[1]. Ordinarily, *prima facie* means until

[1] *Silva v. Weinman (1894) 3 S. C. R. 82.*
Letchiman Chetty v. Perera (1881) 4 S. C. C. 80.

the contrary is proved[1]. In this instance not only is there no evidence that the certificate relates to the deceased wife of the respondent, but the oral evidence proves the contrary.

It now remains for me to consider whether the appellant is the wife of the respondent. There is no evidence from the respondent on this point. He does not deny she is his wife, but in the course of the cross-examination of the appellant and her witnesses it was elicited that the *thali* ceremony did not take place at his marriage with the appellant. Learned counsel for the respondent referred me to the case of *Ratnamma v. Rasiah*[2]. That is a case in which a symbolic *thali* was tied in place of the gold *thali*. My brother Dias held on the expert evidence in the case that the symbolic *thali* was sufficient compliance with Hindu marriage rites. Learned counsel relies on the following statement in my brother's judgment: "It is clear that the tying of the *thali* is an essential requirement for the validity of a marriage between Hindus according to customary rites and if this is not done the marriage ceremony is bad." This statement is apparently based on the decision of the District Judge in the case of *Teywane v. Sidembrenader Cander*[3]. I find myself unable to regard the judgment of the District Court as a binding authority for the proposition stated by my brother especially as it appears from the same report that the decree of the District Court was reversed by this Court.

In the instant case there is no expert evidence either way, nor is there any evidence that according to the custom of the community of Hindus to which the appellant and the respondent belong the *thali* ceremony is a *sine qua non* of a valid marriage. The decisions in Mutukisna's *Thesawaleme* relate to the laws and customs of Jaffna, while the parties to this action are natives of the Eastern Province. It appears from Mutukisna's *Thesawaleme* that, even in Jaffna, the tying of the *thali* is not a custom common to all Hindu communities and that there are certain communities at whose marriage ceremonies the *thali* is not tied. In the case of *Senien Tamby v. Annama*[4], a case involving the validity of the marriage of Hindu Tamils resident in Batticaloa, the marriage was held to be valid even though there was evidence, as in this case, that no *thali* was tied. The case of *Sastry Velaider Aronegary v. Sembecutty Vaigalie*[5], an appeal to the Privy Council from Ceylon cited therein, must be noticed in this connexion. Sir Barnes Peacock says at page 371:

> "It is evident from the parties going through the form of marriage that they intended to be married; and if they were not married according to the strict custom, it was not in consequence of their wish that it should be so. It appears clearly that they did consider, that a valid marriage had taken place."

A custom is a question of fact and must be proved by him who alleges it to exist. Similarly a person who alleges that a certain customary ceremony is essential to a valid marriage must prove that it is so.

[1] *Liversidge v. Anderson (1942) A. C. 206 at 224.*
[2] *(1947) 48 N. L. R. 475.*
[3] *Mutukisna's Thesawaleme, p. 211.*
[4] *(1900) 1 Browne's Reports, p. 28.*
[5] *(1881) 6 App. Cas. 364.*

In the case of the *King v. Perumal*[1] (three Judges), the Indian case of *Brindabun Chandra Kurmokar v. Chundra Kurmokar*[2] was cited with approval. There it was held that when the fact of the celebration of the marriage is established it will be presumed, in the absence of evidence to the contrary, that all the *necessary* ceremonies have been complied with. A similar principle was stated in the case of *Spivack v. Spivack*[3] where it was laid down that the detail and strictness of proof of a marriage required in a criminal prosecution for bigamy is of a totally different standard from that required before a Magistrate who is dealing with the question of the maintenance of a wife alleged to have been deserted.

In civil cases, where there is evidence of the fact of a ceremony of marriage, followed by cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence. The burden of impeaching the factum of a marriage and the presumption of law "*semper praesumitur pro matrimonio*" lies upon the impeaching party. In this case there is evidence of a customary marriage and subsequent cohabitation of the parties. The respondent has failed to discharge his burden. I agree with the learned Magistrate's finding that there was a valid customary marriage.

For the above reasons the appeal is allowed and the judgment of the learned Magistrate is set aside. The case will go back for the learned Magistrate to determine the amount of maintenance he should order having regard to the circumstances of the parties.

Appeal allowed.